

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1570-CR

Cir. Ct. No. 2014CF2425

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NIGEL J. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Judgment affirmed; orders reversed in part and cause remanded with directions.*

Before Kessler, Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Nigel J. Smith appeals a judgment of conviction and the portion of a postconviction order that, following a hearing, denied his motion for plea withdrawal. He also appeals the portion of a second postconviction order that denied reconsideration of his plea withdrawal motion. We conclude that the circuit court erred by refusing Smith's requests to present additional testimony at the postconviction hearing after he improvidently rested his case. We affirm the judgment but we partially reverse the postconviction orders, and we remand for further proceedings.

BACKGROUND

¶2 Police Officer Michael Martin stopped Smith in June 2014. During the course of the stop, Martin frisked Smith and found a gun. The State charged Smith with one count of possessing a firearm in violation of WIS. STAT. § 941.29(2)(b) (2013-14).¹ Smith pled guilty. The circuit court imposed an evenly bifurcated thirty-six-month term of imprisonment.

¶3 Smith moved for postconviction relief seeking plea withdrawal, or, alternatively, sentence modification. As relevant here, he alleged that his trial counsel was ineffective: (1) for failing to advise him properly about the viability of a potential motion to suppress the gun that police found in his waistband; and, (2) for failing to file a suppression motion. Smith indicated that, if called to testify, he would show that counsel did not adequately explore the facts and the law surrounding the investigative stop but instead persuaded Smith to plead guilty and forgo a suppression motion based on advice that any such motion would lack

¹ All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

merit. Smith further indicated that his potential suppression motion would have succeeded and that, had trial counsel properly explained the merits of such a motion, he would have pursued it instead of pleading guilty.

¶4 The circuit court conducted a hearing on Smith's claim for plea withdrawal. At the hearing, trial counsel testified regarding his actions and decisions in relation to a potential motion to suppress. According to trial counsel, he advised Smith that a suppression motion might succeed but, should it fail, the testimony developed at the suppression hearing could hurt Smith in subsequent proceedings. Trial counsel went on to say he and Smith agreed that, instead of actually litigating a suppression motion, trial counsel would instead use the possibility of filing such a motion as leverage in plea negotiations. After trial counsel testified, Smith presented testimony from Martin and from a civilian witness who was with Smith at the time of the stop. Finally, Smith testified briefly on his own behalf, offering evidence only about his recollection of events surrounding the investigative stop. Following Smith's testimony, he rested.

¶5 After the State advised that it had no witnesses, Smith's postconviction counsel began closing argument but almost immediately interrupted the presentation to say that postconviction counsel "wanted to ask Mr. Smith a little bit about [trial counsel] just --." The circuit court directed postconviction counsel to continue with closing argument. Postconviction counsel then made several attempts to persuade the circuit court to reopen the case and hear Smith's testimony about the conversations he had with trial counsel and the actions he claimed his trial counsel took and failed to take in regard to the potential suppression motion. The circuit court denied each request, stating that Smith had rested his case and would not be permitted to reopen it.

¶6 After the parties concluded their arguments, the circuit court ruled from the bench. The circuit court found that the testimony established a “fifty-fifty” chance that a suppression motion would have succeeded. The circuit court next found that postconviction counsel did an “absolutely inadequate job ... in presenting details of [Smith’s] interaction with [trial counsel] which would indicate in any way [that trial counsel] was deficient. The circuit court went on:

I don’t think it benefited [Smith] not to ask him about exactly where [trial counsel] may have pressured and leaned on him to enter the guilty plea, why he argued, or whether he argued that the motion was absolutely sure to fail, which I don’t think he did. But [postconviction counsel] didn’t ask [Smith] about his recollections of that. I mean, basically, these are conversations where we only have two people present and no outside witnesses. And so we get [trial counsel’s] side of the story, but we really don’t get [Smith’s] side of the story because [postconviction counsel] didn’t ask him.

¶7 The circuit court concluded that trial counsel’s testimony established the reasonableness of trial counsel’s actions in pursuing plea negotiations rather than filing a suppression motion and that trial counsel did not perform deficiently in any way. Accordingly, the circuit court denied Smith’s motion to withdraw his plea.

¶8 Smith moved to reconsider, urging the circuit court to reopen the hearing to permit him to supplement his testimony with information about his interactions with trial counsel and the ways in which trial counsel allegedly failed to perform adequately in regard to potential suppression issues. Additionally, Smith asked the circuit court to address his claim for sentence modification.

¶9 The circuit court entered an order denying reconsideration of Smith’s claim for plea withdrawal and denying the motion for sentence

modification. Smith appeals, challenging only the portions of the postconviction orders related to his motion for plea withdrawal.²

DISCUSSION

¶10 In the circuit court, Smith sought plea withdrawal on the ground that his trial counsel was ineffective. To prevail on an ineffective assistance claim, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel’s actions or omissions fell below an objective standard of reasonableness. See *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Counsel’s strategic decisions “rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.” See *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). To prove prejudice in the context of a motion for plea withdrawal, a defendant must show “that there is a reasonable probability that, but for the counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted).

² Smith advises that he has abandoned his claim for sentence modification. Accordingly, we do not consider it. See *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

¶11 On appeal, Smith first asserts that the circuit court erred in denying his claim that trial counsel was ineffective.³ We reject this argument. As Smith concedes, his testimony about the advice he received from trial counsel was “crucial” to his theory that trial counsel misled him and thereby deprived him of the opportunity to dispute the charge against him. Smith never offered that crucial testimony. His postconviction counsel neglected to ask him about his interactions with trial counsel and, when postconviction counsel belatedly recognized the oversight, the circuit court would not allow Smith to retake the stand. Accordingly, we cannot conclude that Smith demonstrated ineffective assistance of counsel.

¶12 We turn to Smith’s alternative argument, namely, that the circuit court erred by refusing to allow Smith to give additional testimony in support of his motion for plea withdrawal after he prematurely rested his case. The decision to reopen a case for additional testimony rests in the circuit court’s discretion. *See Stivarius v. DiVall*, 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984). We review a circuit court’s discretionary decisions with deference. *See Anderson v. Burnett Cty.*, 207 Wis. 2d 587, 598, 558 N.W.2d 636 (Ct. App. 1996). We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper legal standard, and used a demonstrably rational process to reach a reasonable conclusion. *See State v. Conger*, 2010 WI 56, ¶14, 325 Wis. 2d 664, 797 N.W.2d 341.

³ Smith’s appellate counsel cites two *per curiam* opinions as persuasive authority in support of Smith’s claim that trial counsel was ineffective. The rules of appellate procedure prohibit citation to *per curiam* opinions except to support a claim of claim preclusion, issue preclusion, or the law of the case. *See* WIS. STAT. RULE§ 809.23(3)(a)-(b). We remind appellate counsel that failure to abide by the rules of appellate procedure can lead to sanctions. *See* WIS. STAT. RULE § 809.83(2).

¶13 Here, Smith's postconviction counsel repeatedly asked the circuit court to reopen the testimony, explaining that Smith wished to answer only a few additional questions. Postconviction counsel expressly confessed error, admitting that failing to ask Smith about his interactions with his trial lawyer was a mistake, not a strategic decision. The circuit court denied each request to permit Smith to retake the stand, relying solely on postconviction counsel's improvident advisement that Smith had no further evidence to present.

¶14 Because the circuit court did not discuss the facts and the law underlying the decision to refuse additional testimony, our task is to search the record to determine whether, in the proper exercise of discretion, the circuit court's ruling can be affirmed. *See Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶11, 305 Wis. 2d 658, 741 N.W.2d 256; *see also McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). Specifically, we must consider the reason for the evidentiary hearing, whether the proceedings involved a jury, the availability of the parties and counsel, the significance of the evidence sought to be admitted, and whether that evidence would surprise or prejudice one of the parties. *See Stivarius*, 121 Wis. 2d at 157.

¶15 No dispute exists that the circuit court held the postconviction hearing to permit Smith the opportunity to show why he believed his trial counsel was ineffective. The evidence Smith sought to present squarely addressed that issue. The matter was heard by the court alone. The evidence Smith wished to offer would not have been duplicative, nor would it have surprised the State because Smith had outlined the gist of his position in his postconviction motion. Further, only a few lines of the hearing transcript separate the advisement that Smith had no further evidence and the advisement that Smith had not completed the testimony he planned to offer. It is apparent from the record that mere

moments passed between postconviction counsel's decision to rest and postconviction counsel's request to present additional testimony.

¶16 Moreover, the record reveals no countervailing concerns supporting the decision to bar Smith from retaking the stand and answering the questions his postconviction counsel initially failed to ask. Permitting him to do so would not have necessitated a delay in the proceedings or the expenditure of significant resources by the court or opposing counsel. Indeed, the State offered no objection to the additional proposed testimony when Smith sought to present it. Under the totality of the circumstances here, we must conclude that the circuit court erred by not reopening the hearing.

¶17 On appeal, the State acknowledges that the “better practice” would have been for the circuit court to grant Smith's request to retake the stand. Nonetheless, the State argues that any error in preventing Smith from giving additional testimony was harmless in this case. According to the State, the testimony of Smith's trial counsel established a reasonable strategy, namely, to use the possibility of filing a suppression motion as leverage to secure a good plea bargain. The State asserts that additional testimony from Smith “cannot shed light on [trial counsel]'s strategy, let alone render it unreasonable.”

¶18 We do not agree that trial counsel's testimony foreclosed the possibility of proving that trial counsel's actions were objectively unreasonable. To be sure, trial counsel articulated a reasonable strategy regarding how to proceed if Smith elected to plead guilty, but the decision to plead guilty in the first place rested with Smith, not counsel. See *State v. Albright*, 96 Wis. 2d 122, 129-30, 291 N.W.2d 487 (1980). The crux of Smith's postconviction claim for plea withdrawal was that trial counsel was ineffective for failing to give Smith the

information that he needed to decide whether to plead guilty or to dispute the charge. See *State v. Fritz*, 212 Wis. 2d 284, 293, 569 N.W.2d 48 (Ct. App. 1997) (“The effective-assistance-of-counsel right applies to advice as to whether a defendant should accept or reject a plea bargain.”). Postconviction counsel neglected to elicit Smith’s testimony about trial counsel’s alleged deficiencies in this regard. Postconviction counsel’s error was not harmless because, as the circuit court recognized, Smith lost the chance to present his “side of the story,” that is, to describe the ways in which he claimed his trial counsel erroneously advised him regarding his options for resolving the case and thereby improperly caused him to forfeit his right to a trial.

¶19 Accordingly, we reverse the postconviction orders denying plea withdrawal and reconsideration. We remand with directions that the circuit court hear additional testimony from Smith and receive any other evidence that the circuit court believes would assist it in resolving Smith’s motion to withdraw his guilty plea.

By the Court.—Judgment affirmed; orders reversed in part and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

